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# CRYSTAL CROWN HOTEL & RESORT SDN BHD (CRYSTAL CROWN HOTEL PETALING JAYA) v. KESATUAN KEBANGSAAN PEKERJA-PEKERJA HOTEL, BAR & RESORT SEMENANJUNG MALAYSIA

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COURT OF APPEAL, PUTRAJAYA
DAVID WONG DAK WAH JCA
HAMID SULTAN ABU BACKER JCA
UMI KALTHUM ABDUL MAJID JCA
[CIVIL APPEAL NO: W-02(A)-1601-09-2015]
24 JUNE 2020

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***LABOUR LAW:*** *Trade dispute – Collective agreement – Wages – Minimum wages – Service charge – Employee's remuneration package consisted of basic salary and service charge – Employers proposed system to utilise money from service charge pool to meet minimum wage requirement – Whether service charge could be incorporated*
D *into basic salary – Whether service charge could be utilised to top-up basic salary – Whether employer's proposal advantageous to employees*

The appellant managed the Crystal Crown Hotel, Petaling Jaya ('hotel') while the respondent ('union'), was a trade union of the hotel employees. When the hotel first commenced its operations in 1995, there was no
E collective agreement between the hotel and its employees and the employees' remuneration package consisted of, *inter alia*, a basic salary and service charge. The union was only granted recognition in 1999. In 2011, a trade dispute arose between the hotel and the union over the hotel's refusal to commence collective bargaining in respect of the terms and conditions to be
F incorporated in the first collective agreement between the parties. The Industrial Court, adopting the union's proposals, awarded the following: (i) the effective date for the first collective agreement was on 1 October 2011; (ii) a salary adjustment from 1 October 2011; (iii) fixed annual increments from RM40 to RM60 up to 30 September 2013; (iv) fixed annual increments
G from RM60 to RM100 from 1 October 2013; (v) minimum salaries ranging from RM900 to RM1,300 based on job categories; (vi) a 20-step salary structure be implemented; and (v) the service charge system be retained and limited to only employees covered under the scope of the first collective agreement. Dissatisfied, the hotel filed an application for judicial review, at the High Court, to quash the said award but the application was dismissed.
H Hence, the present appeal. In support of its appeal, the hotel submitted that, *inter alia*, (i) in light of the implementation of the Minimum Wages Order 2012 ('MWO'), the service charge could be incorporated into the basic salary or, alternatively, utilised to top-up the basic salary; and (ii) the decision of

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the Industrial Court and the High Court would result in unjust enrichment and discriminatory practice towards the hotel as the employer, since the employees were already receiving substantial amounts as wages. The issues that arose for adjudication were (i) whether the hotel could implement a clean wage system ('CWS') and remove service charge system; and (ii) in the event the service charge system was maintained, (a) whether the hotel could restructure the wages by utilising the service charge or a portion of it to top-up its employee's basic wages to meet the payment of minimum wages; and (b) whether the service charge could be distributed to employees who were not within the scope of the union representation.

**Held (dismissing appeal)**
**Per Umi Kalthum Abdul Majid JCA delivering the judgment of the court:**

**(1)** Based on the National Wages Consultative Council Act 2011, the implementation of the minimum wage system must not, in any way, result in the employees getting anything less favourable than their current wages. The basic restructured wages also must not be less than the amount of wages earned by the employees pursuant to the contract of service. (para 27)

**(2)** The CWS proposed by the hotel did not tilt the balance in the employee's favour. The proposal was less advantageous to the employees as they were deprived of the element that the service charge was a separate element of the remuneration. The introduction of the MWO should not have prevented the employees from receiving the payment of the service charge that they have been receiving the same since the operation of the hotel in 1995. This payment should have been made over and above their basic minimum wage. (paras 33 & 34)

**(3)** The salary of the employees should have come from the hotel's coffers. It would be wrong for the hotel to utilise the monies collected from these payments to assist it in meeting its obligation to pay its employees the basic minimum wages. Paying the employees the basic minimum wages was the hotel's responsibility. The service charge monies were never the hotel's to be utilised for any purpose other than what it was intended for. To use the money for the payment of the minimum basic wages of the employees was akin to using the employees' monies to pay their own salaries. The hotel's proposal to do away with the service charge and introducing a CWS was unfair to the employees. This proposal, if allowed to proceed, would result in the employees' wages being less than the remuneration agreed in their contract of service. This was obviously unfavourable to the employees and was certainly not the intention of the MWO. (paras 35 & 36)

**(4)** In proposing to utilise the service charge fund to meet its obligation to pay the minimum wages, the hotel was trying to escape from its obligation in providing the monies to pay its own employees. The hotel was attempting to comply with the requirements of the MWO without impacting its own finances. This must not be allowed as the hotel should not be entitled to utilise the service charge pool to meet its minimum wages requirement. The implementation of the national minimum wage would fundamentally have a financial impact on all employers and businesses and the hotel was one of the many other employers who would have to bear additional financial responsibility to meet this requirement. Therefore, the hotel should not be excluded from fulfilling its obligation like any other employer. (paras 37 & 38)

**Case(s) referred to:**

*National Union Of Hotel, Bar & Restaurant Workers Peninsular Malaysia & Anor v. Mahsyur Mutiara Sdn Bhd (Sheraton Langkawi Beach Resort) [2018] 1 CLJ 318 CA* ***(refd)***

*Peter Anthony Pereira & Anor v. Hotel Jayapuri Bhd & Anor [1987] 1 CLJ 14; [1987] CLJ (Rep) 12 PC* ***(refd)***

**Legislation referred to:**

Industrial Relations Act 1967, ss. 26(2), 30(4), (5)

National Wages Consultative Council Act 2011, ss. 4(1), 21, 22, 23

*For the appellant - Sivabalan Nadarajah & Reena Enbasegaran; M/s Shearn Delamore & Co*

*For the respondent - Ambiga Sreenevasan & Shereen Selvaratnam; M/s Sreenevasan*

*[Editor's note: Appeal from High Court, Kuala Lumpur; Judicial Review No: 25-163-09-2014 (affirmed).]*

*Reported by Najib Tamby*

## JUDGMENT

**Umi Kalthum Abdul Majid JCA:**

### Introduction

**[1]** This was an appeal from the decision of the learned High Court Judge in dismissing the appellant's/applicant's judicial review application on 19 August 2015 which *inter alia*, sought to quash the Industrial Court Award No. 875 of 2014.

**[2]** The appellant/applicant manages the Crystal Crown Hotel Petaling Jaya which commenced its operations in January 1995.

**[3]** The respondent is a trade union of employees established and registered under the Trade Unions Act 1959.

**[4]** Aggrieved by the decision of the learned High Court Judge in the judicial review proceedings, the appellant/applicant filed an appeal to this court.

**[5]** The appellant/applicant and the respondent in this appeal will be referred to as the hotel and the union respectively.

**Background Facts**

**[6]** In 2012, the Minimum Wages Order 2012 ("MWO") was made as a subsidiary legislation under the National Wages Consultative Council Act 2011 ("Act 732"). It came into force on 1 January 2013 in relation to an employment establishment with at least five employees.

**[7]** Initially, when the hotel first commenced its operation sometime in January 1995, there was no collective agreement between the employees and the hotel. The employees' remuneration package consisted of *inter alia*, a basic salary and service charge. Then on 12 March 1999, the union was granted recognition.

**[8]** A trade dispute had arisen between the hotel and the union sometime around October 2011 over the hotel's refusal to commence collective bargaining. The collective bargaining was in respect of the terms and conditions to be incorporated in the first collective agreement between the parties.

**[9]** The hotel's refusal to commence collective bargaining with the union had resulted in the union sending a letter dated 16 November 2011 to the Director General of Industrial Relations ("DGIR").

**[10]** In the aforesaid letter, the union informed the DGIR that a trade dispute existed between the union and the hotel and sought the assistance of the DGIR to set a meeting to resolve this dispute failing which, the matter be referred to the Industrial Court for an award.

**[11]** In an attempt to resolve the dispute, the DGIR convened a meeting on 9 February 2012. However, the meeting was unsuccessful. Thus, on 16 February 2012, the Minister for Human Resources referred the dispute to the Industrial Court under s. 26(2) of the Industrial Relations Act 1967 ("IRA").

**[12]** On 18 July 2014, the Industrial Court made an award and had adopted the union's proposals. The Industrial Court made the following awards:

(i) the effective date for the first collective agreement is on 1 October 2011;

(ii) a 10% salary adjustment from 1 October 2011;

(iii) fixed annual increments from RM40 to RM60 up to 30 September 2013;

(iv) fixed annual increments from RM60 to RM100 from 1 October 2013;

(v) minimum salaries ranging from RM900 to RM1,300 for the respective job categories as per appendix B to the award;

(vi) a 20-step salary structure be implemented; and

(vii) the service charge system be retained and limited to only employees covered under the scope of the first collective agreement.

**[13]** Dissatisfied with the award of the Industrial Court, the hotel filed a judicial review application seeking *inter alia* to quash the award and for an order of *mandamus* to direct the matter to be remitted back to the Industrial Court to be re-heard before another panel.

**[14]** The hotel's application for judicial review was dismissed by the High Court on 19 August 2015 with costs of RM7,000. Hence this appeal.

**The Appeal**

**[15]** The issues before the court are as follows. First, whether the hotel can implement a clean wage system and remove service charge system. Alternatively, in the event the service charge system is maintained, the second issue is whether the hotel can restructure the wages by utilising the service charge or a portion thereof to top up its employees' basic wages to meet the payment of minimum wages.

**[16]** The next issue is whether in the event the service charge is maintained, the service charge can be distributed to employees who are not within the scope of the union's representation.

**[17]** The counsel for the union contended that the award of the Industrial Court was neither irrational nor illegal. The decision that minimum wages must be paid from the hotel's own coffers instead of from the service charge pool is consistent with O. 6 of the MWO.

**[18]** The union further contended that the service pool belongs to the employees and that the hotel is not entitled to utilise the service charge funds to help it meet its obligation to provide for the payment of minimum wages to its own employees.

**[19]** The union also submitted the service charge system must be retained and the clean wage system must not be implemented. The hotel's obligation

to increase the minimum wages must not be to the detriment of utilising the money collected for the service charge. In other words, the union submitted that the hotel must not pay its employees using the money or a portion thereof from money collected from tips to fulfil its obligation to pay minimum wages.

**[20]** The hotel on the other hand argued that, in light of the implementation of the MWO, the service charge can be incorporated into the basic salary or alternatively, the service charge can be utilised to top-up the basic salary. This is done to bring the basic salary up to the minimum wage requirements under the MWO.

**[21]** The hotel also argued that the service charge pool should be extended to all employees who were in receipt of the service charge prior to the coming into effect of the first collective agreement.

**[22]** The hotel further argued that the learned High Court Judge had erred and had misconceived the role of the Industrial Court in determining a trade dispute under s. 26 of the IRA.

**[23]** The hotel submitted that the learned High Court Judge failed to appreciate that the Industrial Court had acted beyond the scope of the provisions of sub-ss. 30(4) and 30(5) of the IRA. In doing so, the learned High Court Judge had failed to consider the financial ramifications that would result from its award towards the relevant industry, specifically the hotel industry in this matter.

**[24]** In support of its contention, the hotel had explained at length to this court that the Industrial Court and the High Court had erred in deciding that service charge did not belong to the hotel but came from the customers.

**[25]** Reference was made by the hotel to the decision of the Privy Council in *Peter Anthony Pereira & Anor v. Hotel Jayapuri Bhd & Anor* [1987] 1 CLJ 14; [1987] CLJ (Rep) 12 where it was stated that service charge, just like the basic salary, is due under the contract of service. As such, it should be treated similarly as a basic salary. Service charge only belongs to the employees as and when it is paid out to the employees but not before that.

**[26]** The hotel also submitted that the decision of the Industrial Court and the High Court would result in unjust enrichment and discriminatory practice towards the employer (the hotel) as the employees were already receiving substantial amounts as wages. By refusing the employer to utilise the service charge to meet the new raised basic salaries would result in the employees receiving a financial windfall to the detriment of the hotel.

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## Our Decision

**[27]** It is important to note that, based on the provisions of Act 732, the implementation of the minimum wage system must not in any way result in the employees getting anything less favourable than the employees' current wages. The basic restructured wages also must not be less than the amount
B of wages earned by the employees pursuant to the contract of service.

**[28]** We were mindful of the decision in *National Union Of Hotel, Bar & Restaurant Workers Peninsular Malaysia & Anor v. Mahsyur Mutiara Sdn Bhd (Sheraton Langkawi Beach Resort)* [2018] 1 CLJ 318 where this court approved
C the Industrial Court Chairman's explanation on the introduction of the service charge in the hotel industry based on the Privy Council's decision in *Peter Anthony Pereira*'s (*supra*) case which is to replace the practice of tipping which only benefitted the guest service employees of the hotels but not the other employees who are not in direct contact with the customers or patrons of the hotels. In short, it was a collection system that would benefit all
D employees and had become the norm in the hotel industry where it forms part of the wages paid to hotel employees.

**[29]** We further noted the origin of the service charge. The 10% service charge would be levied on the customer's bills and they are paid by the customers. This collection would then be channelled into a fund called the
E service charge fund where 10% of the collection would be retained by the hotel as administrative charges and the remaining 90% would be distributed to eligible employees of the hotel, subject to the service points allocation agreed by both parties.

F **[30]** We pause here to note that the monies in the service charge fund do not come from the employer. These monies are collected from the customers who paid additional 10% of their bills under the supposition that the 10% is going to the employees *in lieu* of tips.

**[31]** We were also of the view that the employees of the hotel are entitled
G to a share of the service charge as this is their contractual entitlement (see example of contract of service of the hotel's employee, cl. 4, p. 284, appeal record vol. 2(2)).

**[32]** The obligation of the hotel to provide for a minimum wage is a separate issue from its obligation to fulfil the contractual entitlement of the
H employees to a share of the service charge collected.

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**[33]** We were of the view that the clean wage system proposed by the hotel does not tilt the balance in the employees' favour. We viewed the proposal as being less advantageous to the employees when they are being deprived of the element that the service charge as a separate element of the remuneration.

**[34]** We were of the view that the introduction of the MWO should not have prevented the employees from receiving the payment of the service charge that they have been receiving since the operation of the hotel in 1995. This payment should have been made over and above their basic minimum wage.

**[35]** We were also of the view that the salary of the employees should have come from the hotel's coffers. As we had stated earlier, the service charge are monies paid by the customers and the patrons of the hotel *in lieu* of tipping. Thus, these payments were made under the aforesaid understanding. It would be wrong for the hotel to utilise the monies collected from these payments to assist it in meeting its obligation to pay its employees the basic minimum wages. Paying the employees the basic minimum wages is the hotel's responsibility. The service charge monies were never the hotel's to be utilised for any purpose other than what it was intended for. To use the money for the payment of the minimum basic wages of the employees is akin to using the employees' monies to pay their own salaries.

**[36]** We also noted that the hotel's proposal to do away with the service charge and introducing a clean wage system is once again unfair to the employees. This proposal, if allowed to proceed, would result in the employees' wages being less than the remuneration agreed in their contract of service. This is obviously unfavourable to the employees and certainly not the intention of the MWO.

**[37]** The hotel's alternative proposal to the clean wage system is to utilise the service charge fund to meet its obligation to pay the minimum wages. In doing so, essentially what the hotel is trying to do is to escape from its obligation in providing the monies to pay its own employees. The hotel is attempting to comply with the requirements of the MWO without impacting its own finances. This must not be allowed as the hotel should not be entitled to utilise the service charge pool to meets its minimum wages requirement.

**[38]** It is pertinent to note that the implementation of the national minimum wage will fundamentally have a financial impact on all employers and businesses and the hotel is one of many other employers who would have to bear additional financial responsibility to meet this requirement. Thus, the hotel should not be excluded from fulfilling its obligation like any other employer.

**[39]** If the hotel is to be allowed to utilise the money from the service charge pool to meet the minimum wage requirement, it would go against the intention of the introduction of the MWO which is to improve the standard of living of the work force in the country. If the hotel is allowed to do so, it would not only defeat the purpose of MWO but the employees would be placed in a vulnerable position where their take home salary can potentially be lower than what they are currently earning at present.

**[40]** We found the hotel's contention that the introduction of the minimum wage together with the service charge collection for the employees would be an unjust enrichment of the employees and would have serious financial consequences to the hotel beyond the scope of s. 30(4), (5) of the IRA, to be untenable and unsustainable. This contention has already been taken into account by the National Wages Consultative Council (Wages Council) and the Minister/the Government under the provisions of Act 732. To this end, we refer to ss. 4(1), 21, 22 and 23 of Act 732 which are self-explanatory and we reproduce below for ease of reference:

**Functions and powers of the Council**

4(1) The functions of the Council shall be:

(a) to advise the Government on all matter relating to minimum wages, including its development at the international level;

(b) to make recommendations to the Government on the minimum wages rates and coverage according to sectors, types of employment and regional areas, and other matters relating to minimum wages and wages;

(c) to consult the public on the minimum wages rates and coverage;

(d) to collect and analyse data and information and to conduct research on wages and the socioeconomic indicators;

(e) to coordinate and supervise, and to evaluate the impact of, the implementation of minimum wages;

(f) to review the minimum wages order;

(g) to deliberate on all matters relating to minimum wages;

(h) to disseminate information and analysis on wages; and

(i) to carry out any other functions as it deems fits to enable it to perform its functions effectively or which are incidental to the performance of its functions.

**Council to have consultation, etc.**

21. Before any recommendation is made under section 22, the Council shall take the following actions:

(a) have consultation with the public on the minimum wages rates and coverage in such manner as the Minister may determine; and

(b) collect and analyse data and information and conduct research on wages and the socioeconomic indicators.

**Council to make recommendation**

22(1) Based on the actions taken under section 21, the Council shall, at such time as the Minister may determine, make a recommendation to the Government through the Minister on the following matters:

(a) the minimum wages rates;

(b) the coverage of the recommended minimum wages rates according to sectors, types of employment and regional areas;

(c) the non-application of the recommended minimum wages rates and coverage to any sectors, types of employment and regional areas or to any person or class of persons;

(d) the commencement of the minimum wages order and the different dates for the commencement of the minimum wages order to different sectors, types of employment and regional areas, or to different persons or class of persons; and

(e) other matters relating to the minimum wages, including the implementation of the recommended minimum wages rates and coverage.

(2) The Government may, after considering the recommendation:

(a) agree with the recommendation; or

(b) direct the Council to review the recommendation within the period as the Government may determine and make a fresh recommendation.

(3) Where the Government directs the Council to review the recommendation and make a fresh recommendation under paragraph (2)(b), section 21 and subsection (1) shall apply.

(4) The Government may, after considering the fresh recommendation made pursuant to subsection (3):

(a) agree with the fresh recommendation; or

(b) disagree with the fresh recommendation and determine the matters specified in paragraphs (1)(a) to (e).

**Minimum wages order**

23(1) Where the Government agrees with the recommendation of the Council under paragraph 22(2)(a) or 22(4)(a) or determines the matters under paragraph 22(4)(b), the Minister shall, by notification in the Gazette, make a minimum wages order on the matters specified in paragraphs 22(1)(a) to (e) as agreed to or determined by the Government.

(2) The Minister may, upon the direction of the Government, by notification in the *Gazette*, amend or revoke the minimum wages order.

In short, we found that service charge is part of the total remuneration package and is not part of basic wages.

**[41]** As such, we found that the decision of the learned High Court Judge did not suffer from any infirmities of illegality and/or irrationality as alleged by the hotel.

**[42]** We were in agreement with the learned High Court Judge that had correctly decided the facts and the laws placed before the Industrial Court did not merit any appellate intervention.

**[43]** We hereby affirmed decision of the High Court which we found was arrived at after careful consideration of the relevant matters and no irrelevant matters were considered. Thus, we were in agreement that a reasonable tribunal similarly circumstanced would have come to the same decision on the same facts.

**Conclusion**

**[44]** Thus, after having given consideration to the submissions of both parties, we unanimously dismissed the hotel's/appellant's appeal with costs of RM10,000. The costs of the appeal were subject to the payment of the allocatur's fee and the deposit was to be refunded.